IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No. 4 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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HINDUSTAN PETROLEUM CORPORATION LTD. - Petitioner(s)
Versus
PRIME FLOOR TILES PVT. LTD. - Respondent(s)

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Appearance :
MS MINOO A SHAH for Petitioner(s) : 1,
MR DIPAK R DAVE for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 14/12/2006

ORAL JUDGMENT

This company petition is filed by the Hindustan Petroleum Corporation Limited (HPCL), a public sector company for an appropriate order of winding up of Prime Floor Tiles Pvt. Ltd. under the provisions of the

Companies Act, 1956, more particularly, sections 433 and 434 of the said Act.

2. It is the case of the petitioner that the respondent company is indebted to the petitioner in the sum of Rs.39,50,000/- together with running interest thereon at the rate of 15% per annum till realization and the respondent company has failed and neglected to make the payment of the said amount due despite repeated requests and services of statutory notices. It is the case on behalf of the petitioner that the company had sold the bulk LPG to the respondent company, the particulars of respective invoices, calculation etc. is narrated in the petition (page 7). It is also the case on behalf of the petitioner that the payment was required to be made by the company by demand draft. However, as a security deposit, the company had handed over various cheques amounting to Rs.39,50,000/- to the petitioner which were subsequently to be replaced by the demand drafts by the company. It is the case on behalf of the petitioner that the respondent company failed to replace the said cheques by demand drafts on due dates and therefore, by letter dated 10th May 2005, the respondent company was requested to make payment of Rs.39,50,000/- before 30th May 2005.

That the company has also given an affidavit/undertaking dated 30th March 2005 agreeing to make the payment of the aforesaid amount. That the petitioner company presented the aforesaid cheques of Rs.39,50,000/- for payment as the company failed to make the payment of the amount outstanding by demand drafts and all the said cheques are returned unpaid with an endorsement “Funds Insufficient”. That despite repeated requests, the company failed to make the payment of the above amount outstanding and therefore, the respondent company was served with a statutory notice on 10-11-2005 and that the respondent company has received the said notice on 21-11-2005. However, company has failed and neglected to even reply to the notice of the petitioner. As the respondent company has failed and neglected to make the payment of the above amount and the respondent company is unable to pay its dues, it is requested to allow the present company petition and to pass appropriate order of winding up of the respondent company and to appoint the Official Liquidator.

3. An affidavit-in-reply is filed on behalf of the respondent company. It has been submitted that the company is a running company and is consuming electricity

and paying electricity bills regularly. It is also further submitted that the company had taken loan from the Rajkot Nagrik Sahkari Bank Limited of Rs.3 crores and against that the company had hypothecated the machinery. It is also further submitted in the affidavit-in-reply that there is some dispute regarding supply of quantity and advance blank cheques taken by the petitioner company from the respondent. It has been submitted in the reply that the petitioner company has not annexed copies of the invoices along with the petition. It is further submitted that if the copies are produced by the petitioner, it would show that there is dispute regarding the quantity of goods supply and advance blank cheques misused by the petitioner company. Replying to the affidavit-in-reply filed by the respondent company, the petitioner company has filed the affidavit-in-rejoinder. Along with the affidavit-in-rejoinder, the petitioner has produced the copies of the invoices against which the payment is due and payable by the company. It is specifically denied that the company had issued any blank cheques to the petitioner. It is also denied that there is a dispute with regard to the supply of quantity of material as alleged. It is submitted in the rejoinder that one Shri Hiteshbhai Vasantbhai Desai, the Director of the company

had executed an affidavit-cum-declaration acknowledging the liability of Rs.38,82,963/-, wherein the details of the cheques along with the amount is mentioned.

4. Ms Minoo Shah, learned advocate appearing on behalf of the petitioner has submitted that the cheques were given by the respondent company by way of security deposit which were subsequently deposited in the Bank and the same are bounced with an endorsement “Insufficient Fund”. It is further submitted that in fact the Director of the respondent company has also acknowledged the liability by way of affidavit-cum-declaration in which particulars of the respective cheques are also given. It is submitted that the respondent company has consumed the LPG supplied by the petitioner and no dispute has ever been raised. It is further submitted by her that even in the reply, the respondent company has failed to establish any dispute with regard to the quantity and/or the amount. Therefore, it is submitted that the submission on behalf of the respondent company in respect of some alleged dispute with regard to the quantity is not a bona fide one and is nothing but an afterthought and to avoid any order in the present company petition. It is submitted that even there was no reply to the statutory

notice. Therefore, it is requested to allow the present company petition.

5. Shri Dipak R. Dave, learned advocate appearing on behalf of the respondent company while opposing the present petition has submitted that the respondent company is a running company and is consuming electricity and paying electricity bills regularly. He has further submitted that there are disputes with regard to the quantity and the amount and that the petitioner company has misused the blank cheques and in view of the fact that there are disputes with regard to the liability and the dues, the only remedy available to the petitioner company is to file a civil suit. It is submitted that the petitioner company has already filed the criminal proceedings under section 138 of the Negotiable Instrument Act and once the said remedy is exhausted, the present company petition under sections 433 and 434 of the Companies Act, 1956 is not maintainable. Shri Dave has relied upon judgment of the Division Bench of this Court in the case of **Tata Iron & Steel Company Ltd. V. Micro Forge (India) Ltd. reported in 2000(2) GLR 1594**. Therefore, it is requested to dismiss the present company petition.

6. Heard the learned advocate appearing on behalf of the parties.

7. The petitioner company is a public sector, Government of India undertaking and had supplied the bulk LPG of Rs.38,82,963.56paisa by different invoices. The copies of respective invoices are produced along with the affidavit-in-rejoinder. The company has issued 13 cheques totalling to Rs. 39,50,000/- as a security deposit in favour of the HPCL. It is the case of the petitioner that the aforesaid payment was to be made by the demand drafts. However, when the demand drafts were not issued and the payment was not made in spite of the repeated requests and demands, the aforesaid cheques came to be deposited and they are bounced for which the complaints are filed for the offence punishable under section 138 of the Negotiable Instrument Act. It is to be noted that Shri Hiteshbhai Vasantbhai Desai, Director of the respondent company has also executed one affidavit-cum-declaration dated 30th March 2005 confirming the aforesaid cheques and liability of Rs.38,82,963.56paisa. It is the case on behalf the respondent company that the petitioner company has misused the blank cheques. However, on

considering the affidavit-cum-declaration dated 30th March 2005, the said submission cannot be accepted. In the said declaration itself on behalf of the company, the aforesaid cheques are confirmed and it has been submitted that the said cheques are given as a security deposit and if the amount of Rs.38,82,963.56paisa is not paid along with interest at the rate of 15% per annum within sixty days, in that case, the company will be entitled to deposit the aforesaid cheques. Neither in the reply not in the sur-rejoinder, the respondent company has disputed the aforesaid affidavit-cum-declaration and/or it is even not the case on behalf of the respondent company that the said declaration was by compulsion and/or force. Even the said declaration, is before the Notary.

8. So far as the contention on behalf of the respondent that when the petitioner has already availed the other remedy by way of filing criminal complaint before the competent criminal Court for the offence under section 138 of the Negotiable Instrument Act, this petition is required to be dismissed, is concerned, it is to be noted that filing of a complaint under section 138 of the Negotiable Instrument Act cannot be said to be availing the remedy for recovery of the amount. Even, otherwise,

merely because some additional remedy is exhausted, is no ground not to entertain the petition for winding up under the provisions of the Companies Act, 1956, when the case is made out that the respondent company has neglected to pay the amount. Under the circumstances, the contention of the petitioner cannot be accepted.

9. It is the contention on behalf of the respondent company that there are dispute with regard to the quantity and the amount due. However, it is required to be noted that neither in the affidavit-cum-declaration nor thereafter till the affidavit-in-surrejoinder is filed, any dispute has been raised with regard to the quantity and/or amount due. On the contrary, by aforesaid affidavit-cum-declaration, the dues for a sum of Rs.38,82,963.56paisa with 15% interest per annum has been confirmed on behalf of the respondent company. Even in the first affidavit-in-reply dated 20th March 2006, no dispute has been raised with regard to quantity and/or the amount due. For the first time, in the further affidavit-in-reply dated 18-7-2006, the respondent company has tried to make out a case and raised the dispute regarding the supply of quantity. Even in the said affidavit dated 18-7-2006, the respondent company

has stated that there is some dispute regarding the supply of quantity and advance blank cheques taken by the petitioner company from the respondent. Thus, even in the affidavit-in-reply also, the respondent company has not stated that what is the dispute regarding supply of quantity. Thus, the aforesaid dispute is raised only for the sake of raising the dispute without any substance and/or any base. Under the circumstances, the alleged dispute of supply of quantity is nothing but a mala fide attempt on the part of the respondent company to avoid any order in the present petition. In view of the above, the judgment cited at the bar on behalf of the respondent company will not be of any assistance to the respondent company. Goods supplied is consumed, cheques issued are bounced, in the affidavit-cum-declaration, the dues are admitted and confirmed. It is also required to be noted that even after filing of the present company petition, the respondent company has hypothecated the plant and machineries with the Rajkot Nagrik Sahkari Ltd and has obtained loan of Rs.4 crores. Considering the fact that in spite of the repeated requests and demands, the respondent company has not been able to pay the aforesaid amount and the amount is due and payable since 2004, it appears that the respondent company is not in a position

to pay the debts of its creditors.

10. It is required to be noted that this petition was fully heard by this Court on 20-11-2006. However, at the request of Shri Dipak Dave, learned advocate appearing on behalf of the respondent company to come out with some reasonable proposal and to make some payment to show the bona fide, the petition was adjourned to 14-12-2006 only for that purpose. Thereafter, when the matter is called out today, the respondent company has neither come out with any reasonable proposal nor has made any payment to show their bona fide. Shri Dave has fairly conceded that as on today, it is not possible for the respondent company to pay any amount to the petitioner. Thus, even after reasonable opportunity was given to the respondent company to come out with a proposal and to make some payment to show their bona fide, the respondent company has failed to avail that opportunity. Under the circumstances, it appears that the respondent company is not in a position to pay the dues to the creditors and has lost its financial substratum and therefore, the respondent company is required to be ordered to be wound up under the provisions of sections 433 and 434 of the Companies Act, 1956.

11. For the reasons stated above, the respondent company is ordered to be wound up. The Official Liquidator attached with this Court is appointed as Official Liquidator for the respondent company. The Official Liquidator is hereby directed to take possession of the property (movable and immovable) of the respondent company along with its bank accounts, cash and accounts books etc. The Official Liquidator shall submit his report within a period of three months. If required, he can take services of the Official Valuer for the purpose of preparation of possession note etc. No costs.

(M.R.SHAH,J.)

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